(2)

No. 84-1057

FILED
JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1984

OPHUS A. HUTCHERSON, JR., et al.,
Petitioners,

v.

BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA
and
TOWN OF ROCKY MOUNT, VIRGINIA,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, BOARD OF SUPERVISORS OF FRANKLIN COUNTY, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COUNSEL OF RECORD:
William R. Rakes
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P. O. Box 1018
Roanoke, Virginia 24005

OF COUNSEL:
John M. Huddle
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P. O. Box 1018
Roanoke, Virginia 24005

Bruce F. Welch
WELCH & JEFFERSON
126 S. Main Street
Rocky Mount, Virginia 24151

Counsel for Respondent,
Board of Supervisors of Franklin County, Virginia

QUESTIONS PRESENTED

I. DID THE DISTRICT COURT AND THE FOURTH CIRCUIT ERR IN RULING THAT, UNDER 28 U.S.C. § 1341 (THE TAX INJUNCTION ACT) AND THE FEDERAL COMMON LAW PRINCIPLE OF COMITY, THE DISTRICT COURT LACKED JURISDICTION TO GRANT MANDATORY INJUNCTIVE RELIEF FROM THE ALLEGEDLY UNCONSTITUTIONAL VIRGINIA TAXING STATUTE SINCE VIRGINIA LAW PROVIDES THE PLAINTIFF TAXPAYERS WITH A PLAIN, SPEEDY AND EFFICIENT REMEDY TO REDRESS THE TAXPAYERS' CONSTITUTIONAL CLAIMS IN THE COURTS OF SUCH STATE?

II. SINCE THE DISTRICT COURT AND THE FOURTH CIRCUIT CONCLUDED THAT ANY FAIR READING OF 28 U.S.C. § 1341 AND THE RELEVANT RECENT CASES OF THIS COURT RENDER THE TAXPAYERS' FEDERAL SUIT MERITLESS, AND THE FIFTH CIRCUIT CASES WHICH THE TAXPAYERS PURPORTEDLY RELIED UPON AS AUTHORITY FOR THEIR CLAIM FOR MANDATORY INJUNCTIVE RELIEF ANTEDATE SUCH DECISIONS OF THIS COURT, DID THE LOWER COURTS ERR IN ORDERING THE TAXPAYERS TO PAY ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 FOR INSTITUTING AND PERSISTING TO LITIGATE A FRIVOLOUS CIVIL RIGHTS SUIT?

III. UPON CONCLUDING THAT THE TAXPAYERS HAD FILED A FRIVOLOUS AND MERITLESS CIVIL RIGHTS ACTION IN FEDERAL COURT

AND PERSISTED TO LITIGATE THEIR ACTION AFTER THE FRIVOLOUSNESS OF SUCH BECAME APPARENT, DID THE DISTRICT COURT AND THE FOURTH CIRCUIT ERR IN ORDERING THE PLAINTIFF TAXPAYERS THEMSELVES TO PAY THE REASONABLE ATTORNEYS' FEES OF THE FRANKLIN COUNTY BOARD OF SUPERVISORS AND THE TOWN OF ROCKY MOUNT UNDER 42 U.S.C. § 1988?

IV. IS 42 U.S.C. § 1988 UNCONSTITUTIONAL INASMUCH AS IT MAKES DEFENDANTS WHO INSTITUTE AND PERSIST IN LITIGATING FRIVOLOUS CIVIL RIGHTS CLAIMS LIABLE, AS A MATTER OF FEDERAL LAW, FOR THE ATTORNEYS' FEES OF THE DEFENDANTS HARASSED BY SUCH FRIVOLOUS SUITS?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	(i)
TABLE OF CONTENTS	(iii)
TABLE OF AUTHORITIES	(vi)
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	7
ARGUMENT	
I. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE TAX INJUNCTION ACT (28 U.S.C. § 1341) AND THE FEDERAL COMMON LAW PRINCIPLE OF COMITY DEPRIVED IT OF JURISDICTION TO ISSUE A MANDATORY INJUNCTION REQUIRING THE COUNTY BOARD OF SUPERVISORS TO EXTEND THE COUNTY'S UTILITY TAX TO AND COLLECT IT FROM THE INHABITANTS OF THE TOWN OF ROCKY MOUNT, VIRGINIA ON THE SAME BASIS AS IT APPLIES TO THE INHABITANTS OF THE COUNTY AT LARGE	12
A. *The Tax Injunction Act, 28 U.S.C. § 1341, Barred the District Court From Granting a Mandatory Injunction "Enjoining" the County's Board of Supervisors to*	

Extend the County's Utility Tax to and Collect it From the Inhabitants of the Town of Rocky Mount on the Same Basis as it Applies to the Inhabitants of the County at Large 12

B. *Even if the Tax Injunction Act Does Not Apply to a Petition for Mandatory Injunctive Relief, the District Court Properly Dismissed the Taxpayers' Complaint Under the Federal Common Law Principle of Comity* 17

C. *The District Court and the Fourth Circuit Court of Appeals Correctly Held That the Laws of the Commonwealth of Virginia Provide a Plain, Speedy and Efficient Remedy for the Plaintiff Taxpayers to Challenge the Constitutionality of Virginia Tax Laws in the Courts of Virginia.* 18

II. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT, UPON DISMISSING THE TAXPAYERS' ACTION, TO AWARD ATTORNEYS' FEES AGAINST THE TAXPAYERS FOR INSTITUTING AND PERSISTING TO LITIGATE A FRIVOLOUS SUIT, AND THE DISTRICT COURT

DID NOT ABUSE ITS DISCRETION IN MAKING SUCH AN AWARD AGAINST THE TAXPAYERS IN THE INSTANT CASE 25

III. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT TO ORDER THE PLAINTIFF TAXPAYERS TO PAY THE ATTORNEYS' FEES INCURRED BY THE FRANKLIN COUNTY BOARD OF SUPERVISORS AND THE TOWN OF ROCKY MOUNT AS A RESULT OF THE PLAINTIFFS' FRIVOLOUS SUIT 30

IV. 42 U.S.C. § 1988 IS CLEARLY CONSTITUTIONAL AS APPLIED BY THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE .. 33

CONCLUSION..... 35

TABLE OF AUTHORITIES

	PAGE
Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980) ..	28
Barber v. Kimbell's, Inc., 577 F.2d 216 n. 28 (4th Cir. 1978)	31
Bishop v. Wood, 426 U.S. 345 (1976)	20
California v. Grace Brethren Church, 457 U.S. 393 (1982)	*Passim*
Chesapeake and Potomac Telephone Co. of Virginia v. City of Newport News, 194 Va. 413, 73 S.E.2d 394 (1952)	21,23
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	*Passim*
City of Staunton v. Mary Baldwin Seminary, 39 S.E. 596 (Va. 1901)	22
Commonwealth v. Tredegar Co., 122 Va. 506, 95 S.E. 279 (1918)	22
Dawson v. Childs, 665 F.2d 705 (5th Cir. 1982)	29
Erie Railway Co. v. Thompkins, 304 U.S. 64 (1938)	34
Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981)	*Passim*
Goff v. Texas Instruments, Inc., 429 F. Supp. 973 (N.D. Tex. 1977)	33
Grubbs v. Butz, 548 F.2d 973 (D.C. Cir. 1976)	31
Harbulak v. County of Suffolk, 654 F.2d 194 (2nd Cir. 1981)	32

Hargrave v. McKenney, 413 F.2d 320 (5th Cir. 1969) 28,29

Hillsborough v. Cromwell, 326 U.S. 620 (1946) 20,23 24

Huddleston v. Dwyer, 322 U.S. 232 (1944)..... 20

Hughes v. Rowe, 449 U.S. 5 (1980)..... 25,33

Hutcherson v. Board of Supervisors of Franklin County, Virginia, 742 F.2d 142 (4th Cir. 1984)..... 20,22 28,31

Hutcherson v. Board of Supervisors of Franklin County, Virginia, No. 82-0377-R Civ., slip op. (W.D. Va. Jan. 10, 1983) 26,31

Johnson v. Black, 103 Va. 477, 40 S.E. 633 (1905)..... 22

Kane v. City of New York, 468 F. Supp. 586 (S. D. N.Y. 1979) *aff'd* 614 F.2d 1288 (2nd Cir. 1979) 32,33

Matthews v. Rogers, 284 U.S. 521 (1932)..... 18

McDonald v. Thompson, 305 U.S. 263 (1938), *reh'g denied,* 305 U.S. 676 (1939) 14

Moss v. Ward, 434 F. Supp. 69 (S. D. N.Y. 1977) 33,34

Moton v. Lambert, 508 F. Supp. 367 (N.D. Miss. 1981)..... 28,29

Perez v. Ledesma, 401 U.S. 82 (1971)..... 16

Pulliam v. Allen, ____ U.S. ____, 104 S. Ct. 1970 (1984) 34,35

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) ..... *Passim*

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 13,15

United Gas Pipeline Co. v. Whitman, 595 F.2d 323 (5th Cir. 1979) 29

Werch v. City of Berlin, 673 F.2d 192 (7th Cir. 1982) 32,33

White v. South Park Independent School District, 693 F.2d 1163 (5th Cir. 1982) 32

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 2,34
U.S. Const. amend V 2
U.S. Const. amend XIV, §1 2,18
28 U.S.C. § 1331 6
28 U.S.C. § 1341 ..... *Passim*
28 U.S.C. § 2101c 6
28 U.S.C. § 2403a 6
42 U.S.C. § 1983 ..... *Passim*
42 U.S.C. § 1988 ..... *Passim*
42 U.S.C. § 2000e-5(k) 3,25
31
Va. Code § 8.01-270 (1984 Repl. Vol.) 4,22
Va. Code § 58.1-3814 (1984 Repl. Vol.) (formerly § 58-617.2) 4,13
26,27
Va. Code § 58.1-3984 (1984 Repl. Vol.) (formerly § 58-1145) 6,21
22

OTHER AUTHORITY

H. Black, *Black's Law Dictionary* (Rev. 4th Ed. 1968) 14
H. R. Rep. No. 94-1558, 94th Cong., 2nd Sess. 7 (1976) 32

No. 84-1057

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

OPHUS A. HUTCHERSON, JR., et al,
Petitioners,

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA
and
TOWN OF ROCKY MOUNT, VIRGINIA,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, BOARD OF SUPERVISORS OF FRANKLIN COUNTY, TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Board of Supervisors of Franklin County, Virginia, by counsel, opposes the Petition for a Writ of *Certiorari* filed on behalf of Ophus A. Hutcherson, Jr., et al., to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 742 F.2d 142 (4th Cir. 1984). The Opinion on the denial of rehearing is not yet reported. The Orders and Opinions of the District Court were not published and are replicated in the Appendix to the Petition, beginning at A-13.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend V:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend XIV, §1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1341:
The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983:
Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory

or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5(k):

In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow

the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Va. Code § 8.01-270 (1984 Repl. Vol.):

No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice; and, without such direction, any party to the suit or action shall have the right at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit or action was not brought on the right side of the court.

After any such amendment has been made, the case shall be placed by the clerk on the proper docket of the court and proceed and be determined upon such amended pleadings.

The defendant shall be allowed a reasonable time after such transfer in which to prepare the case for trial. (Code 1950, § 8-128; 1977, c. 617.)

Va. Code § 58.1-3814 (1984 Repl. Vol.) (formerly § 58-617.2):

A. Any county, city or town may impose a tax on the consumers of the utility service or services provided by any water or heat, light and power company or other corporations coming within the provisions of Chapter 16 (§ 58.1-2600 et seq.), which tax shall not be imposed at a rate in excess of twenty percent of the monthly amount charged to consumers of the utility service and shall not be applicable to any amount so charged in excess of fifteen dollars per month for residential customers. Any city, town or county that on July 1, 1972, imposed a utility consumer tax in excess of limits specified herein may continue to impose such a tax in excess of such limits, but no more.

B. Any tax enacted pursuant to the provisions of this section, or any change in a tax or structure already in existence, shall not be effective until sixty days subsequent to written notice by certified mail from the county, city or town imposing such tax or change thereto, to the registered agent of the utility corporation that is required to collect the tax.

C. Any county, city or town may impose a tax on the consumers of services provided within its jurisdiction by any electric and power, water or gas company owned by another municipality; provided, that no county shall be authorized under this section to impose a tax within a municipality on consumers of services provided by an electric light and power, water or gas company owned by the municipality. Any county tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town imposes a town tax on consumers of utility service or services provided by any corporation coming within the provisions of Chapter 26 (§ 58.1-2600 et seq.), provided that such town (i) provides police or fire protection, and water or sewer services, provided that any such town served by a sanitary district or service authority providing water or sewer services shall be deemed to be providing such water and sewer services itself, or (ii) constitutes a special school district and is operated as a special school district under a town school board of three members appointed by the town council.

Any municipality required to collect a tax imposed under authority of this section for another city or county or town shall be entitled to a reasonable fee for such collection.

D. In a consolidated county wherein a tier-city exists, any county tax imposed hereunder shall apply within the limits of any tier-city located in such county, as may be provided in the agreement or plan of consolidation, and such tier-city may impose a tier-city tax on the same consumers of utility service or services, provided that the combined county and tier-city rates do not exceed the maximum permitted by state law.

Va. Code § 58.1-3984 (1984 Repl. Vol.) (formerly § 58-1145):

A. Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or city wherein such assessment was made. The application shall be before the court when it is filed in the clerk's office. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and wilful discrimination has been made. The proceedings shall be conducted as an action at law before the court, sitting without a jury. The county or city attorney, or if none, the Commonwealth's attorney, shall defend the application.

B. In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment of any tax is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, and he is not able to correct it under §58.1-3981, the commissioner of the revenue shall apply to the appropriate court, in the manner herein provided for relief of the taxpayers. Such application may include a petition for relief for any of several taxpayers.

The Tenth Amendment to the United States Constitution, 28 U.S.C. § 1331, 28 U.S.C. § 2101(c) and 28 U.S.C. § 2403(a) are also relied upon by the Petitioners and are reprinted in the Appendix attached to their Petition.

STATEMENT OF THE CASE

Petitioners' statement of the case is adequate except to the extent that it fails to state that, effective

January 1, 1985, Title 58 of the Code of Virginia was repealed in its entirety and replaced by new Title 58.1. However, §§ 58-617.2 and 58-1145, at issue herein, were carried forward into new Title 58.1 as §§ 58.1-3814 and 58.1-3984, respectively, without change as to any provisions of such Sections which are relevant to the issues at hand.

SUMMARY OF ARGUMENT

The issues of federal law raised by the Petitioners have been adequately addressed in prior decisions of this Court, which decisions were correctly applied by the District Court and the Fourth Circuit Court of Appeals herein. Accordingly, the Court should decline to grant a writ of *certiorari* in the instant case.

Both of the lower courts herein concluded that the District Court lacked jurisdiction over the Taxpayers' suit for injunctive and declaratory relief and damages based upon 28 U.S.C. § 1341 (the Tax Injunction Act) (hereinafter "the Act") and the federal common law principle of comity, since the Taxpayers have an opportunity for a full hearing and judicial determination in the courts of Virginia on the constitutionality of the Virginia taxing statute in question. The Taxpayers have apparently conceded that if an adequate remedy is provided by Virginia law, the lower courts did not err in declining to assert jurisdiction over the Taxpayers' petition for declaratory and prohibitive injunctive relief and damages. They assert, however, that the District Court had jurisdiction to grant them mandatory injunctive relief from the allegedly unconstitutional Virginia taxing statute, notwithstanding the availability of an adequate remedy in Virginia courts. The clear language of the Act itself and the recent decisions of this Court render such an argument frivolous.

The Act states that a district court "shall not enjoin, suspend, or restrain the assessment, levy or collection..." of any state tax where an adequate state remedy is provided. The Taxpayers' claim that mandatory injunctions are not prohibited by the Act necessarily requires that the term "enjoin" means the same as the term "restrain". Such a construction of the Act ignores the established rule of this Court that each word in a statute must be construed to have meaning unless redundancy was clearly intended by the legislature, and fails to explain why the generally accepted usage of the word "enjoin" to refer to mandatory injunctive relief should not apply under the Act. Indeed, the Taxpayers themselves used the term "enjoin" in its mandatory sense in their petition for mandatory injunctive relief.

This Court has stated that the Act has as its basis the federal common law principle of comity, under which federal courts deny equitable relief from allegedly unconstitutional state taxing statutes, provided an adequate state remedy exists for a plaintiff to challenge such a statute. The concern in such a case is that state tax administration might be thrown into disarray during the pendancy of the federal suit and that the states' status as independent sovereigns would be unduly threatened thereby. It was against this background that the Act was adopted, which this Court has characterized as an attempt by Congress to drastically limit federal district court jurisdiction to interfere with so an important a local concern as the collection of taxes.

This strong policy of judicial abstention as expressed in the Act led this Court to rule in 1982 that the Act impliedly bars declaratory relief from allegedly unconstitutional state laws. The Court reasoned that Congress surely would not have intended to prohibit taxpayers from seeking one form of anticipatory relief from

allegedly unconstitutional state tax laws while permitting them to seek another form of relief, since to permit such would defeat the purpose of the Act to drastically limit federal court jurisdiction in the area of state tax administration.

In the face of these decisions by this Court, the Taxpayers take the position that mandatory injunctive relief from allegedly unconstitutional state tax laws is not barred by the Act even where an adequate state remedy exists. The lower courts in the case at bar correctly characterized such a contention as frivolous and without merit.

The frivolousness of the Taxpayers' position in the case at bar is made even more apparent by the fact that even if the Act is inapposite to their claim, the federal common law doctrine of comity would deprive the District Court of jurisdiction. This Court ruled in 1981 that the doctrine of comity survived the passage of the Act in 1937, and bars § 1983 actions challenging the constitutionality of state taxing statutes whenever the remedies afforded by the state in question would qualify as adequate under the Act. The Court reasoned that an adjudication by a federal court that a state taxing statute was unconstitutional would represent an intrusion prohibited under the principle of comity. The recognition of the disruptive effect of such an adjudication upon a state's administration of its tax system was again expressly recognized by the Court a year later when it held that the Act impliedly barred declaratory relief, as discussed above.

Based upon the foregoing, the District Court examined the remedies afforded the Taxpayers by Virginia law, and found them to be adequate under the decisions of this Court since the Taxpayers were afforded an opportunity for a full hearing and adjudication of

their constitutional claims. This interpretation of Virginia law by both lower federal courts is entitled to great deference by this Court, since both of these courts sit in Virginia and are familiar with the intricacies of local practice. It has long been the rule of this Court that it will uphold the lower federal courts' interpretations of state law in such a case unless such interpretations are clearly wrong.

The lower courts in the case at bar were correct in ruling that Title 58 of the Code of Virginia provides the Taxpayers with an adequate remedy, since the Virginia Supreme Court has held that Title 58 affords taxpayers with an opportunity to litigate the constitutionality of Virginia's taxing statutes. But even if Title 58 did not provide the Taxpayers with an adequate remedy within the meaning of the Act, the Court of Appeals concluded that a Virginia trial court would certainly provide the Taxpayers with a full adjudication of their constitutional claims as an exercise of such court's equitable jurisdiction.

Furthermore, the Court of Appeals correctly noted that if the Taxpayers filed an action on the law side of a Virginia trial court's docket in reliance upon Title 58 and such was found to be inapposite to their claims, or filed an action under the court's general equitable jurisdiction and an adequate remedy at law was determined to exist under Title 58, then the Code of Virginia would require the trial court to transfer the Taxpayers' suit to the appropriate side of its docket. The Code of Virginia prohibits a court from dismissing a case merely because it is filed as a law action rather than a petition for equitable relief, or *vice versa.*

Based upon the foregoing, it is apparent that the District Court acted within its discretion in ordering the Taxpayers to pay the Defendants' attorneys' fees under 42 U.S.C. § 1988. This Court has held that plaintiffs

who institute meritless or frivolous civil rights actions, or who persist in litigating the same after the frivolousness of such becomes apparent, may be ordered to pay the reasonable attorney's fees of the defendants subjected to such action. The trial judge, after carefully observing the demeanor of the parties and the merits of their respective cases, concluded as a matter of fact and law that the Taxpayers' had persisted in litigating a claim which the Statutes of the United States and the cases of this Court rendered meritless and frivolous.

The Taxpayers' litigiousness in the instant case is made no less frivolous by their purported reliance upon Fifth Circuit cases holding that mandatory injunctive relief is not barred by the Act. These Fifth Circuit cases antedate the decisions of this Court discussed above, and were decided under the erroneous premise that the Act was an exception to federal court jurisdiction which should be construed narrowly. The Taxpayers' purported reliance upon these early Fifth Circuit cases in filing their suit and persisting to litigate their claim in disregard for the decisions of this Court aforesaid can only be characterized as frivolous. Indeed, based upon a case decided by the Fifth Circuit four months prior to the filing of the Taxpayers' suit herein, it would appear that even the Fifth Circuit has rejected the reasoning of its earlier cases, ruling instead that the Act is to be given a broad interpretation.

The award of attorneys' fees in the instant case effects the intent of Congress in § 1988 to deter the institution of frivolous civil rights suits. Only the United States is expressly barred from recovering attorney's fees under § 1988, and the legislative history of § 1988 establishes that Congress intended attorney's fees to be awarded to all other prevailing parties, including state governmental entities.

This Court has determined that prevailing defendants may recover attorney's fees against civil rights plaintiffs, including pro se plaintiffs, only where frivolous suits have been brought. Such a strict standard, conscientiously applied by lower federal courts as in the case at bar, adequately ensures that plaintiffs will not be deterred from bringing meritorious civil rights suits for fear of an award of attorney's fees against them.

The District Court was correct in dismissing the Taxpayers' suit in the case at bar since Virginia law provides them with an opportunity for a full hearing and judicial determination of their constitutional claims, and the Court did not abuse its discretion in awarding attorney's fees to the Defendants pursuant to § 1988. Accordingly, this Court should decline to issue a writ of *certiorari* in this case.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE TAX INJUNCTION ACT (28 U.S.C. § 1341) AND THE FEDERAL COMMON LAW PRINCIPLE OF COMITY DEPRIVED IT OF JURISDICTION TO ISSUE A MANDATORY INJUNCTION REQUIRING THE COUNTY BOARD OF SUPERVISORS TO EXTEND THE COUNTY'S UTILITY TAX TO AND COLLECT IT FROM THE INHABITANTS OF THE TOWN OF ROCKY MOUNT, VIRGINIA ON THE SAME BASIS AS IT APPLIES TO THE INHABITANTS OF THE COUNTY AT LARGE.

A. *The Tax Injunction Act, 28 U.S.C. § 1341, Barred the District Court From Granting a Mandatory Injunction "Enjoining" the County's Board of Supervisors to Extend*

the County's Utility Tax to and Collect it From the Inhabitants of the Town of Rocky Mount on the Same Basis as it Applies to the Inhabitants of the County at Large.

The Taxpayers have conceded that the District Court lacked jurisdiction by virtue of 28 U.S.C. § 1341 and *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100 (1981), to declare the Virginia taxing statute unconstitutional and to award them prohibitory injunctive relief and money damages, provided that an adequate Virginia remedy is available to them. The Taxpayers claim, however, that the District Court had jurisdiction to declare the Virginia taxing statute unconstitutional and to issue a mandatory injunction to remedy such alleged defect.

The District Court properly dismissed the Taxpayers' Petition for an Order declaring § 58-617.2 of the Code of Virginia (subsequently amended as § 58.1-3814) unconstitutional and "enjoining the County Board of Supervisors to extend the County's utility tax to and collect it from the inhabitants of the Town [of Rocky Mount] on the same basis as it applies to the inhabitants of the County at large". That this is the correct result is made clear by the express provisions of the Tax Injunction Act, 28 U.S.C. § 1341 (hereinafter "the Act") itself, as well as the decisions of this Court construing the Act.

It has long been recognized that "[a] federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost". *Tully v. Griffin, Inc.,* 429 U.S. 68, 73 (1976). This policy of restraint is clearly reflected and confirmed in the congressional command of the Act that "the

district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state". 28 U.S.C. § 1341.

The Taxpayers' claim that a mandatory injunction to require collection of additional taxes is not within the prohibition of the Act necessarily requires that "enjoin" be given the same meaning as "restrain". Such a construction would ignore the "rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent", *McDonald v. Thompson,* 305 U.S. 263, 266 (1938), *reh'g denied,* 305 U.S. 676 (1939), and would also be contrary to the general meaning assigned to the word "enjoin". For instance, "enjoin" is defined as follows in H. Black, *Black's Law Dictionary* (Rev. 4th Ed. 1968):

> To require; command; positively direct. To require a person, by writ of injunction from a court of equity, to perform, or to abstain or desist from, some act.

(Citations omitted). Indeed, the word "enjoin" is used in precisely this mandatory sense in paragraph 6 of the prayer of the Taxpayers' Amended Petition, wherein it is stated:

> That accordingly the court issue its order ENJOINING the County Board of Supervisors to extend the County's utility tax to and collect it from the inhabitants of the town on the same basis as it applies to the inhabitants of the County at large (Plaintiffs' Class);

(emphasis supplied).

In addition to the express language of the Act itself, the decisions of this Court construing the Act

establish that the District Court was correct in dismissing the Taxpayers' Petition for a mandatory injunction. This Court has stated that:

> The statute 'has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully v. Griffin, Inc.*, 429 U.S. at 73, 50 L. Ed. 2d 227, 97 S. Ct. 219. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone)....

Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981) (footnote omitted).

The court in *Rosewell* held that taxpayers could not challenge the assessment of real estate taxes in the federal court system without having first exhausted the remedies within the state court procedures. The court reasoned that:

> If federal injunctive relief were available, 'state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like questions of state regulatory law, are more properly heard in the state courts.'

Id. at 527, (quoting *Perez v. Ledesma,* 401 U.S. 82, 128 n. 17 (1971). The Court concluded that "the reasons supporting federal noninterference are just as compelling today as they were in 1937 [the year in which 28 U.S.C. § 1341 was enacted]". *Id.*

It was this strong policy of federal noninterference with state tax systems which led the Court in *California v. Grace Brethren Church,* 457 U.S. 393 (1982), to hold that the Act divests district courts of jurisdiction to grant declaratory relief from allegedly unconstitutional state tax laws. The Court reasoned that there is little practical difference between injunctive and declaratory relief, and stated:

> WE WOULD BE HARD PRESSED TO CONCLUDE THAT CONGRESS INTENDED TO PROHIBIT TAXPAYERS FROM SEEKING ONE FORM OF ANTICIPATORY RELIEF AGAINST STATE TAX OFFICIALS IN FEDERAL COURT, WHILE PERMITTING THEM TO SEEK ANOTHER, thereby defeating the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.' (Citations omitted)

Id. at 408 (emphasis supplied). Furthermore, the Court stated that "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration". *Id.* at 409 n. 22.

The rationale of *Grace Brethren Church* is controlling in the case at bar. Surely Congress did not intend to allow a federal district court to declare a state tax law to be unconstitutional and issue a mandatory

injunction requiring such state to expand the class of taxpayers subject to the tax, where it has forbidden prohibitory injunctive relief as well as declaratory relief as being too intrusive upon the States as independent sovereigns.

Indeed, as this Court concluded in *McNary,* 454 U.S. 100, 113 (1981), the principles supporting federal noninterference with state tax laws are violated by an adjudication by a federal court that such state tax law is unconstitutional, regardless of the nature of relief requested of the court. Accordingly, the Court in *McNary* held that taxpayer suits under 42 U.S.C. § 1983 are barred by the federal common law principle of comity where the taxpayer has an adequate remedy in the courts of such state.

The express language of the Act and the cases of this Court construing it establish that the lower courts correctly applied the Act to the case at bar. Furthermore, the District Court properly dismissed the Taxpayers' suit since the laws of the State of Virginia provide the Taxpayers with a plain, speedy and efficient remedy in the courts of Virginia.

B. *Even if the Tax Injunction Act Does Not Apply to a Petition for Mandatory Injunctive Relief, the District Court Properly Dismissed the Taxpayers' Complaint Under the Federal Common Law Principle of Comity.*

Even if mandatory injunctions are not within the prohibitive language of the Act, the federal common law principle of comity barred the District Court from asserting jurisdiction over the case at bar. It has long been established that:

> [M]ere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question is involved . . . .

Matthews v. Rogers, 284 U.S. 521, 525-26 (1932).

In *McNary,* 454 U.S. at 108, this Court held that the principle of comity expressed in *Matthews* survived the passage of the Tax Injunction Act in 1937, and has application today to suits which would cause disruption of a state's revenue collection system but which may not be covered by the Act. Accordingly, the Court held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts . . ., provided of course that those remedies [provided by the state] are plain, adequate and complete . . . ." *Id.* at 116. The Court held that "plain, adequate and complete" means the same as "plain, speedy and efficient" within the meaning of the Tax Injunction Act. *Id.* at 116 n. 8.

Accordingly, the Taxpayers' suit for injunctive relief based upon § 1983 and the Fourteenth Amendment of the United States Constitution was properly dismissed by the District Court, since the remedies afforded the taxpayers in Virginia courts are plain, speedy and efficient within the meaning of the Act.

C. *The District Court and the Fourth Circuit Court of Appeals Correctly Held That the Laws of the Commonwealth of Virginia Provide a Plain, Speedy and Efficient Remedy for the Plaintiff Taxpayers to*

Challenge the Constitutionality of Virginia Tax Laws in the Courts of Virginia.

Under both the Tax Injunction Act and the principle of comity, the District Court lacked jurisdiction over the Taxpayers' suit in the case at bar, since the laws of the Commonwealth of Virginia provide a plain, speedy and efficient remedy by which the Taxpayers may challenge the constitutionality of the Virginia taxing statute.

This Court has stated that under the Act, the state remedy must meet certain minimal procedural criteria to qualify as a plain, speedy and efficient remedy. *Rosewell,* 450 U.S. at 512. In determining the minimal procedural criteria, the Court has been mindful that "[i]n order to accommodate these concerns [for comity] and be faithful to the Congressional intent 'to limit drastically' federal-court interference with state tax systems, we must construe narrowly the 'plain, speedy and efficient' exception to [federal court abstention as required by] the Tax Injunction Act". *Grace Brethren Church,* 457 U.S. at 413. Accordingly, this Court has held that a plain, speedy and efficient remedy is afforded by a state where it "provides the taxpayer with a 'full hearing and judicial determination' at which . . . the taxpayer may raise any and all constitutional objections to the tax". *Rosewell* at 514. This standard applies also to cases governed by the principle of comity. *McNary,* 454 U.S. at 116 n. 8.

Both the District Court and the Court of Appeals concluded that Virginia law provides the Taxpayers with an opportunity for a full hearing and judicial determination of all of the Taxpayers' constitutional objections to the Virginia taxing statute. As stated by the Court of Appeals, "it is certain that a bill in equity in the Virginia courts would lie to correct the complaint of the

plaintiffs" in the event that an adequate remedy at law did not exist. *Hutcherson v. Board of Supervisors of Franklin County, Virginia,* 742 F.2d 145 (4th Cir. 1984). However, the Court of Appeals concluded that an adequate remedy at law would be available to the Taxpayers in Virginia courts in light of the broad construction which has been given to the relevant Virginia statutes by the Virginia Supreme Court. *Id.*

It is well established that the rulings by the District Court and the Court of Appeals that Virginia law affords the Taxpayers an opportunity for a full hearing and judicial determination on any and all constitutional objections to the Virginia taxing statute are entitled to great deference by this Court, since both of these courts sit in the Commonwealth of Virginia. As stated by the Court in *Hillsborough v. Cromwell,* 326 U.S. 620, 629-30 (1946), quoting *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944), "[o]n such questions [of local law] we pay great deference to those courts 'who are familiar with the intricacies and trends of local law and practice'". *See also, Bishop v. Wood,* 426 U.S. 345 (1976) (relying on district court judge's expertise regarding the law of the state in which he sits, even though a contrary construction of the city ordinance in issue was quite tenable). Due to the recognized expertise of the lower federal judges in such a case involving state law, "this court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion". *Id.* at 346.

Even if such a deferential standard of review did not apply, the conclusions of the lower courts that Virginia law affords the Taxpayers a state forum in which to fully litigate their constitutional challenges to

the Virginia taxing statute are entitled to be affirmed by this Court. A remedy at law is afforded the Taxpayers by Va. Code § 58.1-3984 (1984 Repl. Vol.) (formerly § 58-1145). The Virginia Supreme Court has stated with reference to this Section and other provisions of the Code related thereto, that "[t]he object of these statutes was to furnish an expeditious and inexpensive remedy against taxes which have been assessed or collected . . . [and] [t]hey are to be liberally construed in order to further the remedy so provided". *Chesapeake and Potomac Telephone Co. of Virginia v. City of Newport News,* 194 Va. 409, 413, 73 S.E.2d 394, 397 (1952). Accordingly, it has long been established in Virginia that "[r]elief under these statutes is not confined to the correction of an assessment which is merely erroneous . . ., [and instead] [t]hey embrace also levies and assessments claimed to be unconstitutional, illegal and void". *Id.*

The Taxpayers' argument that § 58.1-3984 has no application to the case at bar is without merit. The Taxpayers concede that a taxpayer is "aggrieved by any such assessment" within the meaning of this Section when one wishes to challenge the amount of money to be paid by the taxpayer under the state taxing statute in issue. The very premise of the Taxpayers' suit in this case, albeit one which is constitutionally infirm, is that the amount of tax which their class was required to pay to provide funding for a 20% increase in the salaries of teachers employed by the County was inflated by the County's failure to levy such tax against the citizens of the Town of Rocky Mount.

Furthermore, that a class action is permitted by this Section is clear from its statement that "[s]uch application may include a petition for relief for any of several Taxpayers". Va. Code § 58.1-3984 (1984 Repl. Vol.).

§ 58.1-3984 provides taxpayers with even more protection than is required to meet the minimal procedural criteria set forth by this Court in order to qualify as a plain, speedy and efficient state remedy. Unlike the state statutes which were upheld in *Rosewell National Bank,* 450 U.S. 503, and *Grace Brethren Church,* 457 U.S. 393, Va. Code § 58.1-3984 does not limit the remedies of a disgruntled taxpayer to a suit for a refund. Instead, a Virginia taxpayer may challenge the validity of a tax levied upon him prior to paying such tax.

Even if § 58.1-3984 has no application to the case at bar, the Court of Appeals was correct in stating that, in that event, "it is certain that a bill in equity in the Virginia courts would lie to correct the complaint of the plaintiffs". *Hutcherson,* 742 F.2d at 145. The relief granted by a court of equity is complete relief, and it has been long settled in Virginia that injunctive relief is available in a court of equity for a taxpayer subject to the collection of an illegal tax, unless there is an adequate remedy at law. *See, Commonwealth v. Tredegar Co.,* 122 Va. 506, 95 S.E. 279 (1918); *City of Staunton v. Mary Baldwin Seminary,* 39 S.E. 596 (Va. 1901).

Furthermore, Virginia has allowed taxpayers to seek class relief in its courts of equity. *See, Johnson v. Black,* 103 Va. 477, 40 S.E. 633 (1905).

The Taxpayers' remedy in the courts of Virginia is not made inadequate by the possibility that a Virginia court might decline to exercise its equitable jurisdiction because an adequate remedy existed at law, or *vice versa,* since the Taxpayers' suit would not be dismissed but would simply be transferred to the appropriate side of the trial court's docket. *Hutcherson,* 742 F.2d at 145. This result is mandated by Va. Code § 8.01-270 (1984

Repl. Vol.), which states, in part, that "[n]o case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court SHALL direct a transfer to the proper forum". (Emphasis supplied). This Section is mandatory, not discretionary. *Chesapeake and Potomac Telephone Co. of Virginia,* 194 Va. at 417, 73 S.E.2d at 399.

The Taxpayers' claim that the District Court had jurisdiction in the case at bar, notwithstanding the Virginia remedies discussed aforesaid, because of this Court's statement in *Hillsborough,* 326 U.S. at 623, that "[t]he constitutional requirement, however, is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class". Petition at p. 18.

An examination of this statement in the context in which it was made by the Court reveals that the Taxpayers' reliance upon it is erroneous. The case involved a suit for declaratory judgment to have certain assessments on tangible personal property owned by the plaintiff taxpayer declared null and void, claiming that the taxing authorities had consistently and intentionally subjected the taxpayer to discriminatory treatment by assessing her property higher than that of the other members of her class. The court determined that a taxpayer's remedy under New Jersey law "is restricted to proceedings AGAINST OTHER MEMBERS OF HIS CLASS FOR THE PURPOSE OF HAVING THEIR TAXES INCREASED" by increasing the value assigned to their property. *Hillsborough,* 326 U.S. at 624 (emphasis supplied).

In contrast, Virginia law allows the Taxpayers to institute an action directly against the taxing authority in question and to obtain a full adjudication of all alleged constitutional defects in the taxing statute. Under *Rosewell* and progeny, this Court has established that such an opportunity to fully and fairly litigate the Taxpayers' constitutional claims in state court denied the District Court of jurisdiction over the Taxpayers' action.

Moreover, if *Hillsborough* were applied in the manner urged by the Taxpayers, state remedies afforded taxpayers would be inadequate under the Act whenever a state failed to *sua sponte* declare its own taxing statute unconstitutional, since its failure to do so places the "burden" upon taxpayers to file suit to correct the alleged constitutional defects. Such a construction of the Act renders it nugatory.

The Taxpayers also urge that the Virginia remedies afforded them are inadequate because of the likelihood, in their opinion, that a Virginia court would find their claims to be meritless. Petition at p. 16-17. Such an argument was expressly rejected in *Grace Brethren Church,* 457 U.S. at 417 n. 37, wherein the Court stated that "[w]e also reject the appellees' argument to the extent that it assumes that the state courts will not protect their constitutional rights . . ., [for] [s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law". (Citations omitted).

It is clear, therefore, that the Taxpayers have a remedy in the Virginia court system which is "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341 and the principle of comity to address their claims that the Virginia tax statute is unconstitutional. The dismissal of this case by the District Court was

proper, and its prosecution in the District Court to begin with was frivolous and without merit.

II. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT, UPON DISMISSING THE TAXPAYERS' ACTION, TO AWARD ATTORNEYS' FEES AGAINST THE TAXPAYERS FOR INSTITUTING AND PERSISTING TO LITIGATE A FRIVOLOUS SUIT, AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN MAKING SUCH AN AWARD AGAINST THE TAXPAYERS IN THE INSTANT CASE.

The Court of Appeals was correct in ruling that the District Court did not abuse its discretion in awarding attorneys' fees against the Taxpayers in the instant case pursuant to 42 U.S.C. § 1988. This Section provides, in part, that "[i]n any action or proceeding to enforce a provision of . . . [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs". *Id.*

Attorney's fees may be awarded in favor of a prevailing defendant where a court finds that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so". *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978) (applying 42 U.S.C. § 2000e-5(k), the relevant language of which is identical to that of § 1988, to an action brought under Title VII of the Civil Rights Act of 1964). The *Christiansburg Garment Co.* standard applies to awards of attorney's fees under § 1988. *Hughes v. Rowe,* 449 U.S. 5 (1980).

The District Court in the case at bar found "as a matter of fact and as a matter of law that the Plaintiff's [sic] action was frivolous" within the meaning of

Christiansburg Garment Co., reasoning that:

> Any fair reading of the statute [the Tax Injunction Act] and the Supreme Court cases interpreting it clearly instructs that a United States District Court may not entertain an action which in any way challenges the state's levying and collecting of taxes where the state provides a speedy and efficient procedure for challenging such actions. Virginia clearly provides such a procedure.

Hutcherson v. Board of Supervisors of Franklin County, Virginia, No. 82-0377-R Civ., slip op. at 2-3 (W.D. Va., Jan. 10, 1983). The Court of Appeals properly affirmed the District Court's award of attorneys' fees in the instant case since the Taxpayers' claim was frivolous, unreasonable, and groundless and the Taxpayers persisted in pressing their claims after the frivolousness of such became apparent.

The Taxpayers filed their "petition for declaratory judgment and injunctive relief" in the District Court on May 25, 1982, asking the Court to declare Va. Code § 58-617.2 unconstitutional and to issue an order "enjoining" the Franklin County Board of Supervisors to "abate or remove its utility tax as presently applied", or to "extend its application to the residents and utility customers of the Town of Rocky Mount".

Any fair reading of the Act and the cases of this Court would have apprised the Taxpayers that their § 1983 suit in the District Court was meritless. On December 1, 1981, this Court held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts . . ., provided of course that those remedies [provided in state court] are plain, adequate and complete". *McNary,* 454 U.S. at 116. Furthermore, the

District Court clearly lacked jurisdiction over the Taxpayers' prayer for injunctive relief by virtue of the express provisions of the Tax Injunction Act, 28 U.S.C. § 1341, which was enacted in 1937. Moreover, on June 18, 1982, this Court decided *Grace Brethren Church,* 457 U.S. 393, which holds that the Tax Injunction Act deprives district courts of jurisdiction to grant declaratory relief from state tax laws where there is an adequate state remedy within the meaning of the Act.

Taxpayers in the case at bar thus sought to do that which is expressly prohibited. They sought injunctive and declaratory relief from an allegedly unconstitutional state tax law where the state in question, Virginia, afforded the Taxpayers a plain, speedy and efficient remedy within the meaning of the Act. In response to the Defendants' motion to dismiss, the Taxpayers persisted in pursuing their frivolous action by seeking leave to amend their complaint, which leave was granted on July 29, 1982.

The amended complaint retained the prayer of the original complaint that the District Court declare Va. Code § 58-617.2 unconstitutional. It deleted the prayer of the original complaint that the defendant Board of Supervisors be ordered to "abate or remove its utility tax", and prayed that the Court "issue its order enjoining the County Board of Supervisors to extend the County's utility tax to and collect it from the inhabitants of the town on the same basis as it applied to the inhabitants of the county at large". In utter disregard for *McNary,* 454 U.S. at 116, the amended complaint also introduced a claim for compensatory and punitive damages against the Board of Supervisors "as authorized by 42 U.S.C. § 1983, for violations of the civil rights of the Plaintiffs".

From the foregoing, it is clear that the Taxpayers' suit for injunctive relief and damages was meritless

under the settled principles of law existing before the filing of their complaint, and their claim for damages was barred by *McNary* over one year before the amended complaint was filed in the District Court. The District Court and Court of Appeals were correct in ruling that attorneys' fees were available to the defendants under 42 U.S.C. § 1988. As stated by the Court of Appeals:

> In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that the plaintiffs' suit is meritless within the meaning of *Christiansburg Garment Co.*, in that it is unreasonable or groundless and that the plaintiffs continued to litigate after it clearly became so. *Christiansburg Garment Co.*, at 422.

Hutcherson, 742 F.2d at 146.

In spite of the express language of the Tax Injunction Act and the rulings of this Court which are dispositive of the Taxpayers' suit, the Taxpayers' claim that attorneys' fees should not be awarded against them. They claim that such an award is barred by their purported reliance upon several early cases decided in the Fifth Circuit which hold that a mandatory injunction requiring the collection of additional taxes does not "enjoin, suspend or restrain, the assessment, levy or collection" of state taxes within the meaning of the Tax Injunction Act. This position is without merit.

The most recent case cited by the Taxpayers in support of their position is *Moton v. Lambert,* 508 F. Supp. 367 (N.D. Miss. 1981), which relies upon the authority of *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301 (5th Cir. 1980) and *Hargrave v. McKenney,* 413 F.2d 320 (5th Cir. 1969). The fundamental premise of this line of cases is that

"[e]ncroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the constitution must be construed narrowly". *Hargrave,* 413 F.2d at 326.

Accordingly, the premise of *Moton* and its predecessors cannot survive the subsequent conclusions of this Court that "this legislation [the Tax Injunction Act] was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes". *Rosewell,* 450 U.S. at 522. Indeed, the Fifth Circuit has apparently so concluded in *Dawson v. Childs,* 665 F.2d 705, 709 (5th Cir. 1982), wherein it is stated that "[t]he concept that section 1341 is not a narrow statute aimed only at injunctive interference with tax collection, but is rather a broad restriction on federal jurisdiction in suits that impede state tax administration, has continued to gain credence in the federal courts". (quoting, *United Gas Pipeline Co. v. Whitman,* 595 F.2d 323 (5th Cir. 1979). After so stating, the court applied a "broad reading" of the Act and held, *inter alia*, that the Act deprives district courts of jurisdiction over an action to enjoin a tax lien. *Id.* at 710. This latter case was decided on January 14, 1982, four months prior to the filing of the Taxpayers' suit herein.

Moreover, each of these Fifth Circuit cases antedate *Grace Brethren Church,* 457 U.S. at 409 n. 22, wherein the court stated that "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration". The Taxpayers have ignored the conclusion of the Court that:

> [W]e would be hard pressed to conclude that Congress intended to prohibit tax-

> payers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes'.

Id. at 408 (citations omitted).

The Taxpayers' purported reliance upon the Fifth Circuit cases aforesaid is rendered even more unreasonable in light of the fact that such decisions antedate the conclusion of *McNary,* 454 U.S. at 113, that a determination by a federal court that a state taxing statute is unconstitutional would be as fully intrusive and disruptive of the state system as actions for equitable relief barred by the Act and the principle of comity. Upon so concluding, the court held that federal district courts lack jurisdiction to entertain actions for damages under § 1983 where there is an adequate state remedy afforded such claims.

The foregoing establishes that the Taxpayers' claims in the case at bar are "frivolous" within the meaning of *Christiansburg Garment Co.,* 434 U.S. 412, and that the Court of Appeals was correct in ruling that the award of attorneys' fees against the Taxpayers was not an abuse of discretion by the District Court.

III. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT TO ORDER THE PLAINTIFF TAXPAYERS TO PAY THE ATTORNEYS' FEES INCURRED BY THE FRANKLIN COUNTY BOARD OF SUPERVISORS AND THE TOWN OF ROCKY MOUNT AS A RESULT OF THE PLAINTIFFS' FRIVOLOUS SUIT.

The Taxpayers' claim that attorneys' fees cannot be awarded against the Taxpayers themselves in favor of the Franklin County Board of Supervisors and the Town of Rocky Mount is without merit.

After careful observation of the demeanor of the parties and the merits of their respective cases, the District Court concluded "as a matter of fact and as a matter of law that the Plaintiff's [sic] action was frivolous". *Hutcherson,* No. 82-0377-R Civ., slip op. at 2. The Court of Appeals affirmed this finding of the District Court, stating that:

> In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that the plaintiffs' suit is meritless within the meaning of *Christiansburg Garment Co.,* in that it is unreasonable and groundless and that the plaintiffs continued to litigate after it clearly became so. *Christiansburg Garment Co.,* at 422.

Hutcherson, 742 F.2d at 146.

Furthermore, the Court of Appeals found that the district court did not abuse its discretion either in the award of attorneys' fees or in the amount thereof, stating that "[t]he district court, having found that plaintiffs' action was frivolous as a matter of fact of law, was ever so careful in its assessment of attorneys' fees". *Id.* As noted by the Court of Appeals, the District Court required affidavits showing literal item-by-item compliance with the twelve criteria established by *Barber v. Kimbell's, Inc.,* 577 F.2d 216, 226 n. 28 (4th Cir. 1978).

This Court has recognized the importance which Congress placed upon the availability of attorneys' fees to defendants in civil rights cases. With reference to 42 U.S.C. § 2000e-5(k), the relevant terms of which are

substantially identical to those of § 1988, the Court concluded that while Congress desired to make it easier for plaintiffs of limited means to bring a meritorious suit, "equally important, Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party' — be it plaintiff or defendant — could obtain legal fees". *Christiansburg Garment Co.,* 434 U.S. at 420, quoting, *Grubbs v. Butz,* 548 F.2d 973, 975 (D.C. Cir. 1976).

The Congressional desire to deter the bringing of meritless and frivolous civil rights actions becomes no less important when the defendants are governmental entitites rather than private individuals. Indeed, that Congress intended the Defendants in the instant case to be eligible to recover attorneys' fees incurred in defending a frivolous suit is made clear by the legislative history of the Act, *see, e.g.,* H. R. Rep. No. 94-1558, 94th Cong., 2nd Sess. 7 (1976), and by the fact that Congress excepted only the United States from the class of litigants entitled to an award as a "prevailing party" under § 1988. Accordingly, the other Courts of Appeals have not refused to award prevailing governmental defendants attorneys' fees under § 1988 where such defendants were subjected to frivolous civil rights suits. *See, Werch v. City of Berlin,* 673 F.2d 192 (7th Cir. 1982); *Kane v. City of New York,* 468 F. Supp. 586 (S. D. N.Y. 1979), *aff'd* 614 F.2d 1288 (2nd Cir. 1979); *White v. South Park Independent School District,* 693 F.2d 1163 (5th Cir. 1982); and *Harbulak v. County of Suffolk,* 654 F.2d 194 (2nd Cir. 1981).

Equally untenable is the claim of the Taxpayers that lay persons may not be ordered to pay attorney's fees under § 1988 for instituting a frivolous lawsuit. The language of § 1988 conspicuously lacks any such prohibition. Furthermore, this Court applied § 1988 to

a lay defendant in *Hughes,* 449 U.S. 5 (award of attorneys' fees against pro se plaintiff not proper where his § 1983 action was not "frivolous" within the meaning of *Christiansburg Garment Co.,* 434 U.S. 412), and accordingly, so have the lower federal courts. *See, e.g., Goff v. Texas Instruments, Inc.,* 429 F. Supp. 973 (N.D. Tex. 1977) (lay plaintiff represented by counsel is liable for attorney's fees of defendant under § 1988 where suit was frivolous); *Werch,* 673 F.2d 192 (plaintiff liable for attorney's fees of defendant city under § 1988 where § 1341 barred suit for injunctive relief and § 1983 claim was meritless); *Kane,* 468 F. Supp. 586, *aff'd,* 614 F.2d 1288 (pro se plaintiff liable for attorney's fees under § 1988); and *Moss v. Ward,* 434 F. Supp. 69 (S.D. N.Y. 1977) (pro se plaintiff in frivolous § 1983 suit is liable for attorney's fees under § 1988).

The District Court properly applied the standards of *Christiansburg Garment Co.* in determining that the Taxpayers' suit in the case at bar is frivolous, and the Court did not abuse its discretion to award attorneys' fees to the defendants under § 1988. Such award to the Defendants is clearly authorized by the express provisions of § 1988 and the cases of this Court construing the same.

IV. 42 U.S.C. § 1988 IS CLEARLY CONSTITUTIONAL AS APPLIED BY THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE.

This Court has recognized the critical importance of deterring frivolous and vexatious civil rights actions by requiring plaintiffs to pay the attorneys' fees and costs of the defendants subjected to such actions. *Christiansburg Garment Co.,* 434 U.S. at 420. Nevertheless, the Taxpayers in the instant case claim that requiring them to pay the Defendants' reasonable

attorneys' fees incurred as a result of the Taxpayers' frivolous suit would be unconstitutional. The several theories which the Taxpayers present to support such a contention are without merit.

First, the Taxpayers claim that the award of attorneys' fees in the instant case has denied them their First Amendment right to petition the government for redress of grievances, and that the state must bear the costs of defending against frivolous suits "as a necessary and proper operating expense of maintaining a society free of arbitrary and tyrannical oppression". Petition at p. 29-31. Conspicuously lacking in the Petition is any legal authority for such a claim, for indeed, none exists. There is "no constitutional right to access to the courts to prosecute actions that are frivolous and malicious, or even wanton". *Moss,* 434 F. Supp. at 72. Governmental defendants must be entitled to recover attorney's fees under § 1988 in order to deter frivolous lawsuits and avoid the wasting of Taxpayers' money.

The Taxpayers also argue that the rulings of the lower courts in the instant case are constitutionally infirm under *Erie Railway Co. v. Thompkins,* 304 U.S. 64 (1938), apparently under the erroneous belief that the availability of an award of attorney's fees under § 1988 has to be determined by reference to Virginia law. As *Christiansburg Garment Co.* and progeny clearly indicate, § 1988 is of critical importance in protecting federal civil rights and the availability of attorney's fees thereunder is not dependent upon whether such would be available under the law of any state.

An equally frivolous argument asserted by the Taxpayers is that *Pulliam v. Allen,* ____ U.S. ____, 104 S. Ct. 1970 (1984), "by necessary implication . . . has overruled the judgment of the District Court and

the Appeals Court judgment that appellants [sic] are legally and justly obligated to pay the state's attorney fees ordered by the District Court''. Petition at 33. *Pulliam* holds that the common law doctrine of judicial immunity does not bar an award of attorney's fees under § 1988 to one who succeeds in obtaining injunctive relief against a state judicial officer under § 1983. The relevance of *Pulliam* to the case at bar escapes us.

In conclusion, attorneys' fees were awarded against the plaintiff Taxpayers under § 1988 only after the District Court had concluded that their claims were frivolous, unreasonable and meritless within the meaning of *Christiansburg Garment Co.,* and that they had continued to litigate their claims after the frivolousness of such became apparent. The Taxpayers have no constitutional right to institute and persist in litigating frivolous suits in federal court against the Franklin County Board of Supervisors and the Town of Rocky Mount. Furthermore, no constitutional right of the Taxpayers was infringed by the award of attorneys' fees in the instant case. The application of the strict standard of *Christiansburg Garment Co.* in assessing attorneys' fees against civil rights plaintiffs under § 1988 ensures that such plaintiffs will not be deterred from instituting meritorious civil rights for fear of an award of attorney fees against them.

CONCLUSION

In light of the fact that each of the issues raised by the Petitioners have been adequately addressed in the previous decisions of this Court, which were correctly applied by the lower courts herein, the Respondent Board of Supervisors of Franklin County, Virginia

respectfully requests that the Court decline to grant a writ of *certiorari* in this case.

Respectfully submitted,

William R. Rakes
GENTRY, LOCKE, RAKES & MOORE
P. O. Box 1018
Roanoke, Virginia 24005

OF COUNSEL:
John M. Huddle
GENTRY, LOCKE, RAKES & MOORE
P. O. Box 1018
Roanoke, Virginia 24005

Bruce F. Welch
WELCH & JEFFERSON
126 S. Main Street
Rocky Mount, VA 24151

Counsel for Respondent,
Board of Supervisors of Franklin County, Virginia